

9-37.000
FEDERAL HABEAS CORPUS
(28 U.S.C. § 2241-53, 2255)

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9-37.001

Introduction

This chapter contains the Department's policy regarding two different kinds of habeas petitions that prisoners may file: "2255 petitions" and "habeas corpus petitions." Prisoners use 18 U.S.C. § 2255 (2255 petition) to challenge the sentence(s) they are serving, and habeas corpus petitions (under 18 U.S.C. § 2241) to challenge the conditions of confinement.

The Criminal Resource Manual contains a discussion of legal issues related to these petitions:

Introduction to Federal Habeas Corpus	Criminal Resource Manual at 741
Availability of Habeas Corpus Writ -- Jurisdiction and Venue	Criminal Resource Manual at 742
Time Limitations Relating to Federal Habeas Corpus (28 U.S.C. § 2255)	Criminal Resource Manual at 743
Limitations Upon Appeals of Orders Denying Collateral Review	Criminal Resource Manual at 744
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Defenses -- Military Remedies	Criminal Resource Manual at 746
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9-37.002 Policy

Title I of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (the Act), signed by the President on April 24, 1996, amends the law governing motions for collateral relief for Federal prisoners under 28 U.S.C. § 2255. Following enactment of the legislation, the Criminal Division developed Department-wide policies concerning the retroactive application of its key provisions.

Section 102 amends 28 U.S.C. § 2253, which governs appeals in habeas proceedings. The amendment requires a "certificate of appealability" issued by a circuit justice or judge before a prisoner may appeal from the denial of his motion in the district court. That provision will apply to any appeal filed on or after the April 24, 1996 effective date of the legislation.

Section 105 of the Act amends 28 U.S.C. § 2255 to require a prisoner to make a threshold showing and to obtain a certification from a Federal circuit court panel before he is allowed to file a successive motion in the district court. That "gatekeeping" provision likewise applies to any successive motion filed on or after the April 24, 1996 effective date of the amended statute.

Finally, section 105 imposes a one-year time limit on the filing of a § 2255 motion. In the Department's view, application of the time limit varies according to the date on which the prisoner's conviction became final. If the conviction subject to collateral attack became final before April 24, 1996, the prisoner would have had until April 24, 1997, to file his motion. If the prisoner's conviction became final on or after April 24, 1996, he has one year from the date on which the conviction became final in which to file his motion.

Departmental policies governing the retroactive application of these provisions of the Act are more fully explained in the following text which was taken verbatim from the June 24, 1996, Memorandum from the Acting Assistant Attorney General, Criminal Division, to all United States Attorneys' Offices, on the Subject of "Retroactivity of Title I of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132:"

9-37.100 Memorandum -- Retroactivity of Title I of the Antiterrorism and Effective Death Penalty Act of 1996 -- Introduction and Summary

NOTE: The policy outlined in this memorandum may be affected by the June 1997 Supreme Court holding in *Lindh v. Murphy*. For further guidance, see the Criminal Resource Manual at 791.

Memorandum from the Acting Assistant Attorney General, Criminal Division, to all United States Attorneys' Offices, on the Subject of "Retroactivity of Title I of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132"

The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (the Act), was signed by the President on April 24, 1996. Title I of the Act changes the law governing motions for collateral relief for federal prisoners under 28 U.S.C. § 2255. Recently, several courts have asked for the government's views on whether and how Title I may be applied "retroactively" to pending § 2255 motions. This memo states the Department's official position on that issue.

SUMMARY

Title I of the Act makes three main changes to the law governing section 2255 motions. First, Section 102 amends 28 U.S.C. § 2253 to require a "certificate of appealability" before a prisoner may appeal from the denial of his motion in the district court. That provision applies to any appeal filed on or after April 24, 1996. Second, Section 105 of the Act amends 28 U.S.C. § 2255 to require a prisoner to make a threshold showing before he is allowed to file a successive motion in the district court. That "gatekeeping" provision applies to any successive motion filed on or after April 24, 1996. Finally, Section 105 amends 28 U.S.C. § 2255 to impose a one-year time limit on the filing of a Section 2255 motion. In the Department's view, application of the time limit

varies according to the date on which the prisoner's conviction became final. If the conviction became final before April 24, 1996, the prisoner has until April 24, 1997 to file his motion. If the prisoner's conviction became final on or after April 24, 1996, he has one year from the date on which the conviction became final in which to file his motion.

9-37.110 Memorandum, cont'd -- Title I of the Act May Not Be Applied "Retroactively"

A. The Supreme Court's Decision in *Landgraf*. In *Landgraf v. USI Film Products*, 114 S. Ct. 1483, 1505 (1994), the Supreme Court determined whether and how "a federal statute enacted after the events in suit" may be applied to a pending case. Under *Landgraf*, "the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach." *Ibid*. Where Congress issues a "clear statement" regarding the statute's applicability to pending cases, that statement controls. "When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect." *Ibid*. If the statute would operate "retroactively" as applied to a particular case, it may not be used there. In other words, "statutes [may] not apply retroactively unless Congress expressly states that they do." *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447, 1461-1462 (1995) (emphasis in original). The definition of retroactivity is complex, and is discussed further in Part III, *infra*.

B. Title I Has No General Express Retroactivity Clause. Section 107(c) of the Act expressly provides that the death penalty provisions of new 28 U.S.C. §§ 2261-2266 "shall apply to cases pending on or after the date of enactment of this Act," April 24, 1996. Most of the provisions added by Section 107 apply only to habeas petitions filed by state prisoners under 28 U.S.C. § 2254. There is one exception: Section 107 adds new 28 U.S.C. § 2266(a), which requires courts to give "priority" to determination of Section 2255 motions in capital cases. That priority rule therefore applies to any Section 2255 motion in a capital case that is pending (or filed) on or after April 24, 1996. But *cf. Austin v. Bell*, No. 3:86-0293, 1996 WL 284882, at *2-*3 (M.D. Tenn. May 9, 1996). By its terms, however, the retroactivity clause in Section 107(c) does not apply to the remainder of Title I. See *Williams v. Calderon*, 83 F.3d 281, 286 n.2 (9th Cir. 1996); *Edens v. Hannigan*, No. 94-3352, 1996 WL 339763, at *1 n.1 (10th Cir. June 20, 1996). Nor is there any other express retroactivity clause governing the rest of Title I. Congress did not issue a clear statement regarding retroactivity of these provisions. Under *Landgraf*, therefore, they may not be applied "retroactively."¹

9-37.120 Memorandum, Cont'd -- Definition of "Retroactively"

Although Title I clearly may not be applied in cases where it would operate "retroactively," it is more difficult to determine exactly what it means for the statute to operate "retroactively." The Court in *Landgraf* defined retroactivity using a theory of "vested rights." 114 S. Ct. at 1499 (internal quotation omitted). Relying on traditional notions of fairness, the Court reasoned that "individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disturbed." *Id.* at 1497. The Court explained, however, that "[a] statute does not operate [retroactively] merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law." *Id.* at 1499 (citation omitted). Instead, the test is "whether the new provision attaches new legal consequences to events completed before its enactment." *Ibid*. Thus, the conclusion that a statute has been applied "retroactively"

¹ Section 107(c) reflects the unique temporal issues associated with the compliance provisions in Title I's new rules governing capital cases, see, e.g., 28 U.S.C. 2261, and thus does not create an inference of prospectivity for the rest of Title I. See *Leavitt v. Arave*, No. CIV.-93-0024-S-BLW, 1996 WL 291110, at *2 (D. Id. May 31, 1996); *Houchin v. Zavaras*, 924 F. Supp. 115, 116 (D. Colo. 1996). In any case, even if Section 107 (c) did create such an inference, it would be slight: Section 107 applies to any petition "pending" on or after April 24, 1996, and the rest of Title I would therefore apply to any Section 2255 motion "filed" on or after April 24.

comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Ibid.*

A. Jurisdictional Rules. Applying the foregoing definition of "retroactivity," the Court in *Landgraf* explained that a jurisdictional statute is never "retroactive," even when applied to cases pending at the time the statute takes effect. Unlike substantive rules of law, jurisdictional statutes affect "the power of the court rather than * * * the rights of the parties." 114 S. Ct. at 1502 (internal quotations omitted). Litigants have no "vested right" in a court's power to hear their claims. Thus, a jurisdictional statute does not operate "retroactively," even if it bars or authorizes a lawsuit for conduct that occurred before the statute took effect. Indeed, if a lawsuit is properly filed under a jurisdictional statute that is repealed before judgment in the case becomes final, the suit must be dismissed. *Id.* at 1501. (Once a judgment is final, however, separation-of-powers doctrine prevents Congress from reopening it through jurisdictional legislation. See *Plaut*, 115 S. Ct. at 1457, 1463.)

As an example of a jurisdictional rule, the Court cited former 28 U.S.C. § 41(20), which divested district courts of "jurisdiction of cases brought [under the Tucker Act] to recover fees, salary, or compensation for official services of employees of the United States." See 114 S. Ct. at 1501 (citing *Bruner v. United States*, 343 U.S. 112 (1952)). Pending lawsuits by "employees" of the United States were to be dismissed on the day this statute took effect, even if they had been filed long before. See *Bruner*, 343 U.S. at 116-117. The Court in *Landgraf* also mentioned other expressly jurisdictional rules, such as statutes giving the Secretary of the Interior, rather than the federal courts, jurisdiction to determine the heirs of a deceased Indian; statutes conferring jurisdiction over tax cases; and statutes allowing states to be sued for certain civil rights violations. 114 S. Ct. at 1501-1502 (citing cases). Finally, the Court stated that amount-in-controversy requirements for civil lawsuits are jurisdictional rules. *Id.* at 1502 (citing *Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604 (1978)). It explained that it had "regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." *Id.* at 1501.

B. Procedural Rules. The Court in *Landgraf* also held that procedural rules are generally not "retroactive," even if applied in lawsuits involving conduct completed before the rule was promulgated. 114 S. Ct. at 1502. Litigants have "diminished reliance interests in matters of procedure" because procedural rules regulate their secondary (litigation) conduct rather than their primary conduct. *Ibid.* As the Court has repeatedly held, "[n]o one has a vested right in any mode of procedure." *Denver & Rio Grande Western RR. Co. v. Brotherhood of RR. Trainmen*, 387 U.S. 556, 563 (1967); *Ex Parte Collett*, 337 U.S. 55, 71 (1949); *Crane v. Hahlo*, 258 U.S. 142, 147 (1922); see *Setco Enterprises Corp. v. Robbins*, 19 F.3d 1278 (8th Cir. 1994); *Baltimore & Potomac R. Co. v. Grant*, 98 U.S. 398, 401 (1878). Thus, "the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive." *Landgraf*, 114 S. Ct. at 1502.

The *Landgraf* Court warned, however, that the "mere fact that a new rule is procedural does not mean that it applies to every pending case." 114 S. Ct. at 1502 n.29. Because procedural rules regulate litigation conduct, it is the time of the litigation conduct, and not the time of the primary conduct underlying the litigation, that matters for purposes of retroactivity. Thus, "[a] new rule concerning the filing of complaints, would not govern an action in which the complaint had already properly been filed under the old regime, and the promulgation of a new rule of evidence would not require an appellate remand for a new trial" in a case where the evidence had been admitted under the old rule. *Ibid.* The retroactivity analysis would "depend[] on the posture of the particular case." *Ibid.* As Justice Scalia put the matter in his concurring opinion in *Landgraf*, "the critical issue * * * is * * * what is the relevant activity that the rule regulates. Absent clear statement otherwise, only such relevant activity which occurs after the effective date of the statute is covered." *Id.* at 1524 (Scalia, J., concurring) (emphasis in original).

9-37.130 Memorandum, Cont'd -- Application of Retroactivity Principles to Title I

As noted above, Title I makes three main changes to the Act: Section 102 requires a "certificate of appealability" before a prisoner may appeal the denial of his Section 2255 motion. Section 105 imposes "gatekeeping" rules for successive motions. And Section 105 also imposes a one-year time limit for all motions, generally running from the date on which the conviction becomes final on direct review. Each of these changes must be analyzed separately, because "there is no special reason to think that all the diverse provisions of [a statute] must be treated-uniformly for [retroactivity] purposes." *Landgraf*, 114 S. Ct. at 1505.

A. The "Certificate of Appealability" Rule Applies to Appeals Filed on or After April 24, 1996. Section 102 of the Act amends 28 U.S.C. § 2253 to require a "certificate of appealability" before a prisoner may appeal from a district court's denial of his motion. It provides that "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to a court of appeals from * * * the final order in a proceeding under section 2255." A certificate of appealability may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right," and it must "indicate which specific issue or issues satisfy the showing required." The first part of the test roughly resembles the standard that previously governed state prisoners (there was no such requirement for federal prisoners). *See* former 28 U.S.C. § 2253; *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983); *Lozada v. Deeds*, 498 U.S. 430, 431-432 (1991). The second part of the test, requiring identification of specific issues, is new. *See Houchin*, 924 F. Supp. at 116-117.

Section 102 is a procedural change that does not violate any "vested right" under *Landgraf*. Section 102 does not define a new crime or otherwise change the significance of the prisoner's primary conduct. Nor does it change the statutory or constitutional standards governing the procedures used at the prisoner's trial and sentencing. *Cf. Bracco v. Reed*, 540 F.2d 1019, 1020 (9th Cir. 1976) (applying Supreme Court's decision in *Stone v. Powell*, 428 U.S. 465 (1976), which limits availability of habeas relief for Fourth Amendment violations, to pending habeas petitions because it "enunciates no new formulation of the exclusionary rule. * * * No police conduct heretofore unlawful has been legitimated"); *Gates v. Henderson*, 568 F.2d 830, 847 (2d Cir. 1977) (en banc), *cert. denied*, 434 U.S. 1038 (1978); *Holloway v. McElroy*, 632 F.2d 605, 638-639 (5th Cir. 1980), *cert. denied*, 451 U.S. 1028 (1981). Indeed, Section 102 does not even restrict the scope of relief available under Section 2255; it merely controls the availability of appellate review.

Given the *Landgraf* Court's focus on the "posture" of a case in determining the retroactivity of a procedural rule, 114 S. Ct. at 1502 n.29, Section 102 governs any notice of appeal filed on or after April 24, 1996, even if the underlying Section 2255 motion was filed long before. The event governed by the rule is the filing of an appeal, and so the rule governs all appeals filed after its effective date, April 24, 1996. *Cf. Bradshaw v. Story*, No. 96-1006, 1996 WL 308982, at *1 (10th Cir. June 10, 1996).

The certificate requirement does not, however, apply to cases in which the applicant's notice of appeal was filed before April 24, 1996. Just as "[a] new rule governing the filing of complaints would not govern an action in which the complaint had already properly been filed under the old regime," *Landgraf*, 114 S. Ct. at 1502 n.29, so the certificate of appealability provision does not apply to a case in which the notice of appeal was properly filed under the pre-Act law. That result accords with Justice Scalia's analysis in *Landgraf*, because the retroactivity "event" for Section 102 is the filing of the appeal. *See Edens, supra*, at *1 n.1.

B. The "Gatekeeping" Rules Apply to Second or Successive Motions Filed on or After April 24, 1996. Section 105 of the Act amends 28 U.S.C. § 2255, changing the law with respect to second or successive motions. The new law requires a federal prisoner to convince the court of appeals that his second or successive motion relies on either (1) "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense"; or (2) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable."

In particular, new Section 2255 incorporates the "gatekeeping" procedures for successive habeas petitions for state prisoners. "Before a second or successive application permitted by [the Act] is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. § 2244(b)(3)(A). The court of appeals may allow the application to be filed "only if it determines that the application makes a prima facie showing that [it] satisfies the requirements" of the Act. 28 U.S.C. § 2244(b)(3)(C). The issue is considered by a three-judge panel, 28 U.S.C. 2244 (b) (3) (B), which must issue its decision within 30 days, 28 U.S.C. § 2244(b)(3)(D). The court's decision, granting or denying leave to file, is "not appealable" and "shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E).

The gatekeeping requirements are quite clearly procedural, because they merely state the requirements for filing a successive motion. See *Warner v. United States*, Nos. LR-C-96-220, LR-CR-88-84, 1996 WL 242889, *1 n. 4 (E.D. Ark. May 10, 1996); *United States v. Griffin*, Nos. 91-CR-290 et al., 1996 WL 324726 (E.D. Wis. June 10, 1996). If the prisoner cannot meet the gatekeeping standards, his motion is not denied on the merits; instead, it simply may not be filed. See 28 U.S.C. § 2244(b)(3)(A). In that respect, the gatekeeping rules operate like the certificate of appealability provision, limiting judicial review as the prisoner moves away from his direct appeal, without changing the law governing his primary conduct or the law governing the procedures used at trial and sentencing.

Even more than the certificate of appealability provision, however, the gatekeeping rules do not disturb any vested right. Especially in light of the stringent limits imposed by pre-Act law, it cannot seriously be maintained that a prisoner has a "vested right" to file endless numbers of Section 2255 motions. The gatekeeping rules are simply procedural prerequisites to consideration of the merits of a second or successive motion. The relevant procedural event is the filing of the motion, and so the gatekeeping rules apply to second or successive petitions filed on or after April 24, 1996. See *Williams*, 83 F.3d at 284 (gatekeeping rules do not apply to habeas petition filed before the Act took effect); *Warner*, *supra*, at *1 (same); cf. *United States ex rel. Maselli v. Reincke*, 383 F.2d 129, 131 (2d Cir. 1967) (1966 amendments to 28 U.S.C. 2254 (d) and (e), requiring prisoner to produce transcript of state proceedings in district court, do not apply in a case on appeal from district court decision rendered before the amendments took effect).

C. The One-Year Time Limit Applies to All Section 2255 Motions Filed on or After April 24, 1996; With Respect to Convictions that Became Final before April 24, 1996, The Time Limit Allows Filing Until April 24, 1997. Section 105 of the Act creates a "1-year period of limitation" in which to file a Section 2255 motion. The one-year period begins at the latest of several specified dates: (1) "the date on which the judgment of conviction becomes final" on direct appeal; (2) "the date on which the impediment to making a motion created by government action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action"; (3) "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review"; and (4) "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." No motion may be filed outside the time limit.

In the Department's view, retroactivity principles allow the time limit provision to be treated as a procedural rule, and to govern any Section 2255 motion filed on or after, April 24, 1996. As the Court made clear in *Landgraf*, however, retroactivity analysis ultimately turns on legislative intent. For a variety of reasons, the Department believes that the following interpretation of the time limit most faithfully adheres to Congress' intent in passing the Act: Where a prisoner's conviction becomes final before April 24, 1996, subsection (1) of the time limits allows him to file a motion any time before April 24, 1997 -- one year after the date of the Act. Where a prisoner's conviction becomes final on or after April 24, 1996, subsection (1) affords him one year from the date on which the conviction becomes final.

1. There is an argument that the time limit provision is a "jurisdictional" rule under *Landgraf*. A Section 2255 motion is "a further step in the movant's criminal case" that seeks review of the final judgment entered and affirmed on direct appeal. Advisory Committee's Note to 28 U.S.C. § 2255, Rule 1; see *United States v. Frady*, 456 U.S. 152, 181-182 (1982) (Brennan, J., dissenting). Section 105 of the Act sets the time for filing the motion, and therefore operates much like Fed. R. App. P. 4, which prescribes the time in which to file an appeal from a judgment entered in district court. The courts have uniformly recognized that Rule 4 is a jurisdictional rule, in the sense that it may not be waived by the parties or ignored or equitably tolled in the court's discretion. See, e.g., *Smith v. Barry*, 502 U.S. 244, 248 (1992); *United States v. Angiulo*, 57 F.3d 38, 40-41 (1st Cir. 1995); *United States v. Ferraro*, 992 F.2d 10, 11 (2d Cir. 1993) (per curiam); cf. *Carlisle v. United States*, 116 S. Ct. 1460, 1465 (1996); *Berman v. United States*, 378 U.S. 530, 530-531 (1964) (per curiam). Like Rule 4, Section 105 is a mandatory, jurisdictional, non-waivable rule.

Nonetheless, although Section 105 is jurisdictional in the sense that it cannot be waived, in our view it is not a "jurisdictional" rule for purposes of retroactivity analysis under *Landgraf*. The Court there explained that jurisdictional rules "speak to the power of the court" to hear a case, and therefore govern any case that remains under the court's power -- i.e., any pending case. 114 S. Ct. at 1502 (internal quotation omitted); see *id.* at 1525 (Scalia, J., concurring). The express jurisdictional rules and amount-in-controversy provisions discussed in *Landgraf* regulate a court's power to review certain *types* of cases, and have ongoing significance in any pending case: a lawsuit for \$9,999 is always a lawsuit for \$9,999. See *id.* at 1501-1502. In contrast, time limits are satisfied, once and for all, at the time of filing: they have no ongoing significance to the court's power to hear the case. Unlike other jurisdictional rules, therefore, time limits should not govern cases in which the regulated event has already occurred. See *St. Louis v. Texas Worker's Comp. Comm'n*, 65 F.3d 43, 45-47 & n.5 (5th Cir. 1995) (new statute of limitations for ADEA suits is a procedural change that applies to 2 cases filed after its effective date), *cert. pending*, No. 95-8803.²

2. Thus, while Section 105 can affect the jurisdiction of the court, it is best seen as a "procedural" rule for purposes of retroactivity analysis because it regulates the procedure for filing a Section 2255 motion. As the Court explained in *Landgraf*, 114 S. Ct. at 1502 n.29, "[a] new rule concerning the filing of complaints would not govern an action in which the complaint had already properly been filed under the old regime." Under retroactivity principles, section 105 would govern any motion filed on or after April 24, 1996, regardless of the date on which the prisoner's conviction became final.

3. Although retroactivity principles allow Section 105 to govern all motions filed after the Act, we do not think that Congress intended that result where the prisoner's conviction became final before the Act. The purpose of creating a time limit is to ensure prompt filing, but that purpose is not served by applying the time limit to prisoners who could not have known that delay would be fatal. Cf. *Landgraf*, 114 S. Ct. at 1524-1525 (Scalia, J., concurring) (retroactivity analysis depends on the "purpose" of a new rule). For example, applying the time limit to all motions filed after the Act would bar a motion by a prisoner whose conviction became final on April 23, 1995, and who first learned of the time limit when the Act was signed 366 days later, after it was too late for him to meet it.

² The conclusion that Section 105 is a jurisdictional rule that should not be treated exactly like other jurisdictional rules for purposes of retroactivity is fully consistent with the decision in *Landgraf*. The Court there acknowledged that "[a]ny test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity." 114 S. Ct. at 1499.

Accordingly, we will pursue the following approach: for prisoners whose convictions became final before the Act was signed, the Department will not seek to enforce subsection (1) of the time limit provisions until one year after the Act took effect -- i.e., April 24, 1997. That policy affords these prisoners at least as much time as their counterparts whose convictions become final after the Act's effective date, and reduces any potential unfairness. For prisoners whose convictions become final on or after April 24, 1996, we will enforce the time limits as written.

Note to Assistant United States Attorney: Feel free to use all or part of this memo verbatim in documents you file in court. If you have further questions about Title I of the Act or its retroactivity, please contact David S. Kris of the Criminal Division, Appellate Section, by telephone (202) 514-9111; e-mail CRM04(KRIS); or fax (202) 514-8232.